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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1957

No. 949

W. H. MORAND, AND WIFE, MARGARET OLIBENE MORAND, *Appellants*

VS.

CITY OF RALEIGH, NORTH CAROLINA, *Appellee*

Appeal from the Supreme Court of the State of North Carolina.

STATEMENT AS TO JURISDICTION

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No.....

W. H. MORAND, AND WIFE, MARGARET OLIBENE MORAND, *Appellants*

versus

CITY OF RALEIGH, NORTH CAROLINA, *Appellee*

Appealed from the Supreme Court of the State of North Carolina

STATEMENT AS TO JURISDICTION

The appellants, pursuant to United States Supreme Court Rules 13 and 15 file this, their STATEMENT, of the basis upon which it is contended that the Supreme Court of the United States has jurisdiction on a direct appeal to review the final judgment of the Supreme Court of North Carolina, which has upheld the constitutionality of a city ordinance as applied to appellants against appellants' contentions that the same contravened their rights under the state and federal constitutions.

OPINION BELOW

The Supreme Court of North Carolina filed a written opinion in this cause on the 11th day of December, 1957. The said opinion is reported in the following publications: 247 N. C. 363 and 100 S.E. 2d 870. The opinion of the Supreme Court of North Carolina is reproduced in the appendices to this STATEMENT as Appendix "A" hereof. The mandate of the Supreme Court of North Carolina, issued on the 11th day of December, 1957, to the Superior Court of Wake County, is reproduced in the appendices to this STATEMENT as Appendix "B" hereof. The judgment of the trial court, to-wit; the Superior Court of Wake County, State of North Carolina, is found in the Record which was before the Supreme Court of North Carolina. See *City of Raleigh vs. W. H. Morand and wife, Margaret Olibene Morand,* State Record Number 449, Fall Term, 1957, Pages 10 and 11. The said judgment also contains four numbered findings of fact and conclusions of law. The judgment of the Superior Court of Wake County, North Carolina, as mentioned above and which is dated the 11th day of June, 1957, is reproduced in the appendices to this STATEMENT as appendix "C" hereof.

JURISDICTION

The appeal herein is from a final order and opinion of the Supreme Court of North Carolina which sustained the judgment of the Superior Court of Wake County, North Carolina, entered by His Honor, F. Donald Phillips, Judge Presiding, (State Record Number 449, Pages 10 and 11). The mandate and opinion of

the Supreme Court of North Carolina are dated the 11th day of December, 1957. The State Supreme Court, by its mandate and opinion, affirmed the judgment of the Superior Court, which judgment had concluded.

> "That the use of the defendants' said land for a trailer park or camp and for profit constitutes as violation of a valid and subsisting zoning ordinance of the City of Raleigh and that such use was commenced by defendants after the adoption and effective date of the ordinance prohibiting such use." (State Record, Page 11). See also Appendix "C" of this STATEMENT.

The appellee, plaintiff in this trial court, a municipal corporation, sought to enjoin the appellant-defendant from using certain of appellants' land as a trailer park or camp, contending that appellants' use of appellants land as a trailer park or camp was in violation of zoning ordinances duly enacted by appellee. The land involved in this litigation is all beyond and without the appellee's corporate limits, but is within one mile of said limits. The ordinances involved in this litigation purport to be effective beyond appellee's corporate limits for a span of one mile. The said ordinances are reproduced in the appendices to this STATEMENT as Appendix "D" hereto.

To the complaint of appellee-plaintiff which alleged a violation of appellee's zoning ordinances, appellant answered as follows:

> "4. That the resolution of the City Council of the City of Raleigh, which plaintiff alleges in paragraph 5 of its complaint to be a duly adopted ordinance of the City of Raleigh, is in intent, in purpose and in fact discriminatory and in violation of Article I, Section 7, of the Constitution of the State of North Carolina and in violation of the Constitution of the United States and the same is therefore void.
>
> "5. That the resolution of the City Council of the City of Raleigh, which plaintiff alleges in paragraph 5 of its complaint to be a duly adopted ordinance of the City of Raleigh, is confiscatory in that it attempts to deprive defendants of their property without due process of law in violation of Article I, Section 17, of the Constitution of the State of North Carolina and in violation of the Constitution of the United

States, and said alleged ordinance is therefore void." (State Record, Pages 8 and 9).

In their answer, appellants prayed that the injunctions requested by appellee-plaintiff be denied and that the "alleged ordinance, which the plaintiff seeks to enforce, be declared void, invalid, unconstitutional and without legal status," (State Record, Page 9). From the refusal of the trial court to (1) dismiss the appellee's action upon appellants' motion to dismiss which was made prior to introduction of any evidence, and to (2) grant appellants' motions for judgment as of nonsuit and to (3) the trial court's signing and entry of judgment, the appellants excepted, assigned error and appealed to the Supreme Court of North Carolina, (State Record Pages 13, 19, 22 and 23). In affirming the trial court the Supreme Court of North Carolina concluded in its Opinion:

> "The contention that the provisions of the zoning ordinance prohibiting the use of the defendants' property, which lies within an area zoned for residential purposes, for use as a trailer camp, constitute arbitrary, unreasonable and dis-criminatory restrictions upon the property of the defendants, is untenable. The ordinance applies alike to all property within the territory affected . . .
>
> "We hold that the ordinance under consideration, which prohibits the construction and maintenance of a trailer camp within arears zoned for residential purposes within the City of Raleigh and within one mile of its corporate limits, is a valid exercise of the police power and may be enforced by injunctive relief," *City of Raleigh vs. Morand et al*, 247 N. C. 363, 100 S.E. 2d 870.

Appellants filed notice of appeal in the office of the Clerk of the Supreme Court of North Carolina to the Supreme Court of the United States on the 28th day of February, 1957, pursuant to 28 U.S.C. 1257 (2) and Rule 10, Revised Rules of the Supreme Court of United States, the validity of state enactments, to-wit, the zoning ordinances of the City of Raleigh, being drawn in question, on the ground of their being repugnant to the Constitution and laws of the United States, the decision and opinion of the Supreme Court of North Carolina being in favor of their validity. Appellants' Notice of Appeal to the Supreme Court of

the United States is reproduced in the appendices to this STATEMENT as Appendix "E" hereof. This Notice of Appeal was served upon counsel for appellee on the 3rd day of March, 1958, in accordance with the provisions of Rule 33(3) (a), Revised Rules of the Supreme Court of the United States. Appellants notice of appeal was filed and served well within the time allowed by law for the filing and service of notice of appeal. See 28 U.S.C. 2101 (c); Rules 10 and 11, Revised Rules of the Supreme Court of the United States.

The ordinances involved in the instant litigation, (Appendix "D" of this STATEMENT), are state statutes within the meaning of the words "statute of any state" as used in 28 U.S.C. 1257 (2), *Jamison vs. Texas*, 318 U. S. 413, 63 S. Ct. 669, 87 L. ed. 869; *Railway Express Agency vs. New York*, 336 U. S. 106, 69 S. Ct. 463, 93 L. ed. 533; *Saia vs. New York*, 334 U. S. 558, 68 S. Ct. 1148, 92 L. ed. 1574; *King Manufacturing Company vs. City Council of Augusta*, 277 U. S. 100, 48 S. Ct. 489, 72, L. ed 801. The validity of the said ordinances was unequivocally "drawn in question" in the courts below by virtue of appellants' Other and Further Defense to their Answer to appellee-plaintiff's complaint, (State Record, Pages 8 and 9). *Compare Dahnke-Walker Milling Company vs. Bondurant*, 257 U. S. 282, 42 S. Ct, 106, 66 L. ed. 239; *Beard vs. City of Alexandria, La.*, 341 U. S. 622, 71 S. Ct. 920, 95 L. ed. 1233; *Lovell vs. City of Griffin, Ga.*, 303 U. S. 444, 58 S. Ct. 666, 82 L. ed. 949. Moreover, since the validity of the said ordinances was actually passed upon by the Supreme Court of North Carolina, the manner of raising the constitutional question in the trial court is of no consequence on this appeal, *City of Raleigh vs. Morand et al.*, 247 N. C. 363, 100 S. E. 2d 870. Compare *Chicago R. I. & P. R. & P. R. Co. vs. Perry*, 259 U. S. 548, 42 S. Ct. 524, 66 L. ed. 1056; *Home Insurance Co. vs. Dick*, 281 U. S. 397, 50 S. Ct. 338, 74 L. ed. 926; *Nickey vs. Mississippi*, 292 U. S. 393, 54 S. Ct. 743, 78 L. ed. 1326; *Whitefield vs. Ohio*, 297 U. S. 431, 56 S. Ct. 432, 80 L. ed. 778; *People of Illinois ex rel. McCollum vs Board of Education of School District No. 71; Champaign, Ill.*, 333 U. S. 203, 68 S. Ct. 461, 92 L. ed. 648, 2 A. L. R. 2d 1338.

Although the Equal Protection and Due Process Clauses of the 14th Amendment to the United States Constitution are not set

out in exact and precise terms in appellants' pleadings to the appellee-plaintiff's complaint, (State Record, Pages 8 and 9), no question can arise but that these two federal constitutional provisions were brought to the attention of the trial court and were considered by the Supreme Court of North Carolina in affirming the judgment of the trial court. In paragraph 4 of appellants' Other and Further Defense, appellants alleged that the ordinances involved in the instant litigation are "in intent, in purpose and in fact *discriminatory* and in violation of Article I, Section 7, of the Constitution of the State of North Carolina *and in violation of the Constitution of the United States* . . . "(Emphasis added.) This allegation could have no other effect other than to implead the Equal Protection Clause to the 14th Amendment to the United States Constitution. In paragraph 5 of the said pleading appellants alleged that the ordinances involved in the instant litigation are *"confiscatory* in that the attempt *to deprive defendants of their property without due process of law* in violation of Article I, Section 17, of the Constitution of the State of North Carolina *and in violation of the Constitution of the United States* . . .," (State Record Page 9), (Emphasis added). This allegation was manifestly and almost in precise language an invocation of the Due Process Clause of the 14th Amendment to the Constitution of the United States. And it must be remembered that the North Carolina Constitution does not contain an equal protection clause or due process clause, hence the word "discriminatory" and the words "to deprive defendants of their property without due process of law "could only refer to the Equal Protection and Due cess Clause of the Constitution of the United States. Compare Section 7 and 17 of Article I, Constitution of North Carolina. See also, *Copperweld Steel Company vs. Industrial Commission of Ohio*, 324 U. S. 780, 65 S. Ct. 1006, 89, L. ed. 1363; *New York ex rel. Bryant vs. Zinnerman*, 278 U. S. 63, 49 S. Ct. 61, 73 L. ed. 184. Finally, the opinion of the Supreme Court of North Carolina dispells any ambiguity which may be imagined or created by ingenuity of counsel as to the particular provisions of the federal Constitution which appellants have invoked, *City of Raleigh vs. Morand supra.* Compare *Saltonstall vs. Saltonstall*, 276 U. S. 260, 48 S. Ct. 225, 72 L. ed. 565; *Chicago R. I. & P. R. Co. vs. Perry, Supra; Home Insurance Co. vs. Dick, supra; Nickey vs. Mississippi, Supra; Whitfield vs. Ohio. supra.*

Decisions of this Court are uniform in holding that no particular language is necessary to the raising of a federal question or in invoking the protection of a provision of the Constitution of the United States so long as the federal claim and the ground therefor are brought to the attention of the state court with "fair precision." See *Tilt vs. Kelsey*, 207 U. S. 43, 28 S. Ct. 1, 52 L. ed. 95; New York Ex Rel. *Bryant vs. Zimmerman, supra; Toledo, St. Louis & Western Railroad Company vs. Otto E. Slavin.* 236 U. S. 454, 35 S. Ct. 306, 59 L. ed. 671; *Consolidated Coal Co. vs. People of the State of Illinois*, 185 U. S. 203, 22 S. Ct. 616, 46 L. ed. 872; *W. A. Cissna vs. State of Tennessee*, 246 U. S. 289, 38 S. Ct. 306, 62 L. ed. 720; *Yazoo & Mississippi Valley Railroad Company vs. Wirt Adam*, 180 U. S. 1, 21 S. Ct. 240, 45 L. ed. 395; *Kaukauna Water Power Company vs. Green Bay & Mississippi Canal* 142 U.S. 254, 12 S. Ct. 173, 35 L. ed. 1004; *State of Montana Ex Rel Charles S. Haire vs. James H. Rice*, 204 U. S. 291, 27 S. Ct. 281, 51 L. ed. 490; *Copperweld Steel Company vs. Industrial Commission of Ohio, Supra.* See also *Terminelo vs. Chicago*, 337 U. S. 1, 69 S. Ct. 894, 93 L. ed. 1131, for the scope of this Court's inquiry. Thus, it is conclusively demonstrated that appellants have duly raised in the courts below the question as to whether the ordinances involved in the instant litigation are constitutional in in accordance with the standards of the Equal Protection and Due Process Clauses of the 14th Amendment to the Constitution of the United States and that the Supreme Court of North Carolina has entered a decision and opinion in favor of the constitutionality and validity of the appellee's ordinances and against appellants.

QUESTIONS PRESENTED

Effective on the 15th day of February, 1952, the appellee-municipal corporation, acting pursuant to Chapter 540, Session Laws of North Carolina, 1949, (See appendices to this STATEMENT, Appendix "D"), extended its comprehensive zoning ordinances to include the area outside of its corporate limits and within one mile in all directions therefrom. This action is crystalized into Ordinance No. 293 which is reproduced on Pages 25, 26, and 27 of the Record before the State Supreme Court and which is reproduced as a part of Appendix "D" to this STATEMENT. North Carolina

General Statute 160-172 confers zoning power upon municipal corporations, and the said statue is reproduced in the appendices to this STATEMENT as Appendix "E" hereof.

Effective on the 16th day of December, 1955, appellee-municipal corporation adopted an amendment to its ordinances affecting the parking of house trailers in "residential districts." This action prohibited the use of land, within an area designated as a "residential district," for the parking of occupied house trailers, excepting a use which is not material upon this appeal, (See Appendix "D", of this STATEMENT, Ordinances 419 and 542. The land in question upon this appeal is owned by appellants, was so owned by appellants prior to the passage of the ordinance in question (State Record Number 449, Fall Term, 1957, page 19) and is outside of the appellee's corporate limit but within one mile of said corporate limit and within an area over which appellee-municipal corporation has presumed to extend its zoning ordinance. Appellants' land lies within a "residential district," if appellee's extention of its zoning ordinance is effective as applied to them, (State Record Page 11, Findings of Fact No. 2). The trial court found the following facts which bring into focus the questions on this appeal:

> "3. That the defendant W. H. Morand admitted that he had devoted his said land to use as a trailer camp or park and that at the time of the hearing he was renting house trailer space to sixteen house trailers at a charge of $16.00 per month for each house trailer."
>
> "4. That the use of the defendants' said land for a trailer park or camp and for profit constitutes a violation of a valid and subsisting zoning ordinance of the City of Raleigh and that such use was commenced by defendants after the adoption and effective date of the ordinance prohibiting such use;"

Hence, the principal questions presented are as follows:

> 1. Whether the zoning ordinances of the City of Raleigh are invalid and unconstitutional, as applied to appellants, because of unreasonable, confiscatory and oppressive restrictions upon appellants' property and business, both of which are located beyond the corporate limits of the City of Raleigh, and because of repugnance of the said zoning ordinances to

the Due Process Clause of the 14th amendment to the United States Constitution?

2. Whether the zoning ordinances of the City of Raleigh are invalid and unconstitutional, as applied to appellants, their property, which is located outside of appellee's corporate limits, and the business thereon conducted by appellants, because of discriminatory and unreasonable restrictions upon appellants' property and business—all of which is located beyond appellee's corporate limits, and because of repugnance of the said zoning ordinances to the Equal Protection Clause of the 14th Amendment to the United States Constitution?

STATEMENT OF CASE

Appellee is a municipal corporation known as the City of Raleigh. The appellants are husband and wife owners of the property herein involved, which is located near the City of Raleigh, within one mile of the corporate limits, but not within said limits and were such owners of such property prior to the enactment of the ordinance in question, (State Record Number 449, Fall Term, 1957, Page 19). In 1952, appellee extended its zoning jurisdiction to include the property of appellants, which is included in the instant litigation, without extending its corporate limits to so include the said property, and not withstanding the purported extension of appellee's zoning jurisdiction, appellants' property is and was at all time material to the instant litigation, beyond appellee's corporate limits.

As suggested in previous portions of this STATEMENT, appellee instituted a proceeding for injunctive relief against appellants, praying "that defendants be perpetually restrained and enjoined from the continued construction of a house trailer park on said premises or the use of said premises for the purpose," as provided, by North Carolina General Statute 160-179, (State Record, Page 5). To this complaint, as indicated above, appellants, as defendants below, filed an answer praying "that the alleged ordinance which the plaintiff seeks to enforce, be declared void, invalid, unconstitutional and without legal status," (State Record, Page 9). In their answer, as indicated above in a preceding section of this STATEMENT, defendants alleged the unconstitu-

tionality of appellee's zoning ordinance as applied to appellants and appellants' land, by reason of conflict with both state and federal constitutional provisions, (State Record, Pages 8 and 9).

Prior to the introduction of evidence in the cause by plaintiff, the appellee-municipal corporation on this appeal, appellants moved the court to dismiss the appellee's action. (State Record, Pages 9 and 10). The motion was overruled by the trial court over appellants' objection, (State Record, Page 10). Appellee, as plaintiff, offered evidence the net effect of which was to locate appellants' land within the one mile zone outside of appellee's corporate limits and to charge appellants with personal notice of the enactment of the zoning ordinances involved in this litigation, (State Record, Pages 13 to 19). Appellants offered only the testimony of the male appellant, which was more or less in rebuttal of the evidence offered by appellee, (State Record, Pages 19, 20 and 21). At the end of appellee's evidence and at the end of all of the evidence, appellants made motions for judgment as of non-suit, which motions were both overruled by the trial court over defendants' exceptions, (State Record, Pages 19 and 21). The parties had, theretofore waived a jury trial and had consented that the judge Presiding might find the facts. The trial court's findings of fact are incorporated in its judgment which is dated the 11th day of June, 1957, (State Record, Pages 10 and 11). Appellants assigned as error, among other things, (1) the failure of the trial court to dismiss the action against them, (2) the failure of the trial court to grant their motions for judgment as of non-suit, and (3) the signing and entry of judgment against them in the cause, (State Record, Pages 22 and 23).

As indicated above, the federal questions involved upon this appeal were first raised in the Other and Further Defense which appellants filed as a part of their Answer to appellee's complaint, (State Record, Pages 8 and 9). As further indicated by the opinion of the Supreme Court of North Carolina in this cause, (City of Raleigh vs. Morand, 247 N. C. 363, 100 S. E. 2d 870), appellants' exception to the signing of the judgment against him and his federal contentions, did present the federal constitutional questions to the Supreme Court of North Carolina for review. The Supreme Court of North Carolina stated, in ruling upon the instant cause:

"The exception to the signing of judgment, however, does present these questions: (1) Do the facts found support the conclusions of law and the judgment entered thereon, and (2) does any error appear upon the face of the record?"

After stating the issues in this manner, the Supreme Court considered seriatum, all of the objections, state and federal, to the ordinances as set out in appellants' Answer. See opinion, Appendix "A" to this STATEMENT. See also appellants' Answer, (State Record, Pages 8 and 9). In view of these circumstances, it is observed that the decision of the court below necessarily turned upon the court's determination of the federal constitutional issue involved. Compare *Roby vs. Colehour,* 146 U. S. 153, 13 S. Ct. 47, 36 L. ed. 922; *Chicago Life Insurance Co. vs. Needles,* 113 U. S. 574, 5 S. Ct. 681, 28 L. ed. 1084; *Dorchy vs. Kansas,* 272 U. S. 306, 47 S. Ct. 86, 71 L. ed. 248.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The questions arising in the instant litigation involve the legality and extra-territorial effect of the zoning ordinances of a municipality when measured by the standards of the 14th Amendment to the United States Constitution. The questions involved in the instant litigation *do not* relate to the extra-territorial effect of municipal jurisdiction for sanitary or police purposes, but the questions relate to the asserted power of a municipal corporation to direct that land outside of the corporate limits, but within one mile thereof, conform its use to the same use to which the adjacent municipal land has been devoted. In short, the instant litigation involves the asserted power of the municipality to confiscate property rights of adjacent land owners, without compensation, for the purpose of aesthetic increment to municipal property near the corporate limits and for the purpose of aesthetic increment to municipal uniformity in general. Such an assertion of power is within the prohibitions of the Due Process Clause of the 14th Amendment to the United States.

It is ancient learning that mere aesthetic considerations will not validate a zoning ordinance which has the effect of confiscating the property right of the owner, even when no extra-territorial prob-

lems are involved, *Women's Kansas City St. Society vs. Kansas City, Mo.*, (C. C. A. 8th) 58 F. 2d 593; *Village of University Heights et al vs. Cleveland Jewish Orphans Home*, (C. C. A. 6th) 20 F 2d. 743. *Mayor and Council of Wilmington vs. Turk*, 14 De Ch. 392, 129 A 512. In view of the circumstance that the property herein involved is not within the appellee's corporate limits and the fact that sanitation and police jurisdiction are not involved, it is apparent that appellants' property rights are being sacrificed upon the altar of aesthetic considerations.

It is also ancient learning that the property of one person cannot be confiscated for the private benefit of another, *Myles Salt Company vs. Board of Commissioners of Iberia and St. Mary Drainage District*, 239 U. S. 478, 36 S. Ct. 204, 60 L. ed. 392; *Union Refrigerator Transit Company vs. Commonwealth of Kentucky*, 199 U. S. 194, 26 S. Ct. 36, 50 L. ed. 150; *Village of Norwood vs. Ellen R. Baker*, 172 U. S. 269, 19 S. Ct. 187, 43 L. ed. 443. In the instant case, since appellants' land is not within the appellee's corporate limits, it is obvious that appellants' property right are being confiscated for the benefit of property within appellee's corporate limit. This is particularly true in view of the circumstance that the enactments herein protested were enacted by appellee-municipality presumably for its own benefit. See also *Loesch Allotment Co. vs. Village of Newburgh Heights*, 100 N. E. 2d 543; *Barney & Casey Co. vs. Town of Milton*, 324 Mass. 440, 87 N. E. 2d 9.

If the appellee's ordinances be considered as though enacted by the General Assembly of North Carolina rather than by the appellee's governing body, the measures are subject to the infirmity that it is an arbitrary, confiscatory and unreasonable classification within the prohibition of the Equal Protection Clause of the 14th Amendment to the United States Constitution. The instant questions are substantial and do not appear to have been before this Court, as such, but the decisions of this Court undoubtedly indicate the invalidity of appellee's ordinances as applied to appellants. While the parking of trailers in residential areas of communities has been before the federal courts in at least one prior case, (*Connor vs. West Bloomfield Tp. et al*, (C. A. 6th) 207 F. 2d. 483), the questions of whether or not a municipality can extend its zoning ordinances beyond its corporate limits and whether or not a

municipality can, by enactment of ordinances, prohibit or restrict a property owner's use of his property outside of the municipality where sanitary considerations are not involved, have not been previously decided by this Court. Appellants respectfully submit that the questions presented in this STATEMENT are substantial and merit the attention of this Court.

CONCLUSION

WHEREFORE, it is respectfully submitted that this Court has jurisdiction of this appeal under Section 1257 (2), Title 28, United States Code, as is clearly and fully demonstrated above.

Respectfully Submitted,

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APPENDIX "A"

CITY OF RALEIGH v. W. H. MORAND AND WIFE, MARGARET OBILENE MORAND.

(Filed 11 December, 1957)

APPEAL by defendants from *Phillips, J.*, June Civil Term 1957 of WAKE.

This is a civil action instituted by the City of Raleigh on 9 January 1957 against the defendants for the purpose of obtaining a permanent injunction restraining the defendants from the continued construction and maintenance of a house trailer park on the premises of the defendants, alleged to be within one mile of the corporate limits of City of Raleigh.

When this cause came on to be heard, the parties agreed that his Honor might hear the evidence, find the facts, without the intervention of a jury, and render judgment upon the facts found. His Honor found the facts and entered judgment as follows:

"1. That the plaintiff, a municipal corporation, extended the zoning jurisdiction conferred upon it by Article 14 of Chapter 160 of the General Statutes of North Carolina and its Charter (Chapter 1184, Session Laws of North Carolina, 1949) to the area outside of its City limits and within one mile in all directions therefrom, pursuant to authority conferred upon it by Chapter 541 (540), Session Laws of North Carolina, 1949, by Ordinance No. 293 adopted January 23, 1952 and effective February 15, 1952.

"2. That the property of the defendants described in the complaint lies within one mile of the City limits of the City of Raleigh and within an area zoned for use as a residential area.

"3. That the defendant W. H. Morand admitted that he had devoted his said land to use as a trailer camp or park and that at the time of the hearing he was renting house trailer space to sixteen house trailers at a charge of $16.00 per month for each house trailer.

"4. That the use of the defendants' said land for a trailer park or camp and for profit constitutes a violation of a valid and subsisting zoning ordinance of the City of Raleigh and that such use was commenced by defendants after the adoption and effective date of the ordinance prohibiting such use;

"It Is Now, Therefore, Ordered and Adjudged that the defendants and each of them be and they are restrained and enjoined from continuing the operation of said trailer camp or park on their said property for any use not permitted by the zoning ordinance of the City of Raleigh."

The defendants appeal to the Supreme Court, assigning error.

Paul F. Smith, attorney for plaintiff appellee.

Alfonso Lloyd, Charles O'H. Grimes, for defendants appellant.

Denny, J. The appellants took no exceptions to the findings of fact or the conclusions of law entered pursuant thereto in the court below. Hence, no exceptions having been taken to the admission of evidence or to the findings of fact, such findings are presumed to be supported by competent evidence and are binding upon appeal. *Goldsboro v. R. R.* 246 N.C. 101, 97 S.E. 2d 486; *James v. Pretlow,* 242 N.C. 102, 86 S.E. 2d 759; *Beaver v. Paint Co.,* 240 N.C. 328, 82 S.E. 2d 113; *Donnell v. Cox,* 240 N.C. 259, 81 S.E. 2d 664; *Wyatt v. Sharp,* 239 N.C. 655, 80 S.E. 2d 762. Likewise, since no exceptions were taken to the findings of fact or conclusions of law, the exception to the refusal of the court to grant the appellants' motion for judgment as of nonsuit presents no question for review with respect to the findings of fact or the conclusions of law. *Goldsboro v. R. R. supra.* The exception to the signing of the judgment, however, does present these questions: (1) Do the facts found support the conclusions of law and the judgment entered thereon, and (2) does any error appear upon the fact of the record? *Goldsboro v. R. R. supra,* and cited cases.

It is clear that the City of Raleigh extended the zoning jurisdiction conferred upon it pursuant to the statutes and its charter, as set forth in the court's finding of fact No. 1 hereinabove

set out, by Ordinance No. 293, adopted 23 January 1952 and which became effective 15 February 1952, as amended by Ordinance No. 542 which is set out in the record and which became effective 16 December 1955. It likewise appears from the findings of fact that the use of the defendants' land for a trailer park or camp was commenced by the defendants after the adoption and effective date of the ordinance prohibiting such use.

The appellants assign as error the refusal of the court below to grant their motion to dismiss this action on the ground that the plaintiff is not entitled to have the defendants enjoined from violating the provisions of its zoning ordinance. We have held otherwise. *Raleigh v. Fisher,* 232 N.C. 629, 61 S.E. 2d 897; *Fayetteville v. Spur Distributing Co.,* 216 N.C. 596, 5 S.E. 2d 838. In fact, G.S. 160-179 expressly authorizes the use of the injunctive power of the court to enjoin violations of zoning ordinances. This assignment of error is overruled.

The defendants contend that since the complaint and the findings of fact erroneously refer to Chapter 540, Session Laws of North Carolina, 1949, as Chapter 541, it appears on the face of the record that the zoning ordinance of the City of Raleigh, as amended, is without legal validity. The contention is without merit. It clearly appears from other parts of the record that the ordinance prohibiting trailer camps in residential areas of the City and within one mile thereof in all directions was passed pursuant to the provisions of Chapter 540, Session Laws of North Carolina, 1949. Consequently, the erroneous references will be treated as typographical errors only.

The appellants further contend that their property lies in an area outside the City of Raleigh, not subject to city taxes, peopled by nonresidents of the City of Raleigh, and receiving no benefits from said city. Therefore, they contend that on the face of the plaintiff's complaint the ordinance sought to be enforced is unreasonable and arbitrary and cannot in any way be said to further the general welfare of the City of Raleigh.

In *Harrington v. Renner,* 236 N.C. 321, 72 S.E. 2d 838, this Court, speaking through Devin, C. J., said: "Statutes which have been passed authorizing the governing bodies of municipal cor-

porations to enact zoning ordinances prescribing that in certain areas only designated types of buildings may be erected and used have been generally upheld by the courts as an exercise of the police power of the State. *Kinney v. Sutton,* 230 N.C. 404, 53 S.E. 2d 306; *In re Appeal of Parker,* 214 N.C. 51, 197 S.E. 706; *Ahoskie v. Moye,* 200 N.C. 11, 156 S.E. 130; *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (71 L. ed. 303).

"By Chapter 250, Laws of 1923, now codified as G.S. 160-172, *et seq.*, the General Assembly 'for the purpose of promoting health, safety, morals or the general welfare of the community' granted to the legislative bodies of cities and towns power to regulate the use of real property in respect to the character and purpose of buildings to be erected therein, to divide the municipality into zones in accord with a comprehensive plan, and to provide the manner in which such regulations should be established and enforced."

In the case of *S. v. Rice,* 158 N.C. 635, 74 S.E. 582, 39 L.R.A. (N.S.) 266, this Court said: "The Legislature has unquestioned authority to confer upon the town authorities jurisdiction for sanitary or police purposes of territory beyond the city limits." *Holmes v. Fayetteville,* 197 N.C. 740, 150 S.E. 624.

It is likewise stated in 37 Am. Jur., Municipal Corporations, Sections 284, page 918, "The legislature has power to confer on a municipal corporation police jurisdiction over adjoining territory immediately next to and within a specified short distance of the corporate limits."

Also, in 58 Am. Jur., Zoning, Section 18, page 950, it stated: "Zoning laws are enacted in the exercise of the police power, and, where upheld, are upheld as a proper exercise thereof."

In the last cited authority in section 63, page 981, it is declared: "The validity of a zoning statute and ordinance relating to the division of a municipality into zones and the prohibition in particular zones of camping grounds conducted for private gain has been upheld as against the contention that they were arbitrary, unreasonable, and discriminatory." In Yokley's Zoning Laws and Practice, 2nd Ed., Trailers, section 253, page 149, it is said:

"The right of a municipality to regulate trailers and trailer camps by placing them in certain zones and by excluding them from other zones is well settled."

The contention that the provisions of the zoning ordinance prohibiting the use of the defendants' property, which lies within an area zoned for residential purposes, for use as a trailer camp, constitute arbitrary, unreasonable, and discriminatory restrictions upon the property of the defendants, is untenable. The ordinance applies alike to all property within the territory affected. *Kinney v. Sutton,* 230 N.C. 404, 53 S.E. 2d 306; *Wake Forest v. Medlin,* 199 N.C. 83, 154 S.E. 29.

Furthermore, when it is shown that an ordinance in question has been adopted by the governing board of a municipality and that fact is shown, as it has been in this case, there is a presumption in favor of the validity of the ordinance *S. v. Baynes,* 222 N.C. 425, 23 S.E. 2d 344; *Durham v. R.R.,* 185 N.C. 240, 117 S.E. 17. Consequently, there is a presumption that the zoning ordinance of the City of Raleigh constitutes a proper exercise of the police power, and the burden was upon the appellants in the court below to show otherwise. *Kinney v. Sutton, supra; Suddreth v. Charlotte,* 223 N.C. 27 S.E. 2d 650. The defendants have failed to carry the burden in this respect. Moreover, no error appears upon the face of the record. *Cf. S. v. Owen,* 242 N.C. 525, 88 S.E. S.E. 2d 832.

We hold that the ordinance under consideration, which prohibits the construction and maintenance of a trailer camp within areas zoned for residential purposes within the City of Raleigh and within one mile of its corporate limits, is a valid exercise of the police power and may be enforced by injunctive relief.
The judgment of the court below is

Affirmed.

APPENDIX "B"

SUPREME COURT OF NORTH CAROLINA

CITY OF RALEIGH v. W. H. MORAND AND WIFE, MARGARET OLIBENE MORAND.

No. 449

WAKE COUNTY

This cause came on to be argued upon the transcript of the record from the Superior Court, Wake County:

Upon consideration whereof, this Court is of the opinion there is no error in the record and proceedings of said Superior Court.

IT IS THEREFORE, CONSIDERED AND ADJUDGED by the Court here that the opinion of the Court as delivered by the Honorable Emery B. Denny, Justice, be certified to the said Superior Court, to the intent that the JUDGMENT IS AFFIRMED.

And it is considered and adjudged further that the defendants and surety to the appeal bond, J. A. Neff, do pay the costs of the appeal in this Court incurred, to-wit, the sum of Twenty-Six Dollars and 06/100 ($26.06) an execution issue therefor.

ADRIAN J. NEWTON
Clerk of the Supreme Court

By: Mary B. Kirby
Deputy Clerk

APPENDIX "C"

IN THE SUPERIOR COURT

North Carolina, Wake County

CITY OF RALEIGH, vs. W. H. MORAND AND WIFE, MARGARET CLIBENE MORAND

JUDGMENT

This cause coming on to be heard at the June Assigned Civil Term 1957 of the Superior Court of Wake County and being heard by his Honor F. Donald Phillips, Judge presiding, by consent of the parties that his Honor might find the facts without the intervention of a jury and render judgment upon the facts found, and the defendants having agreed that certified copies of the pertinent ordinances and the official zoning map of the City of Raleigh could be received in evidence without further proof thereof, the Court finds the following facts:

1. That the plaintiff, a municipal corporation, extended the zoning jurisdiction conferred upon it by Article 14 of Chapter 160 of the General Statutes of North Carolina and its Charter (Chapter 1184, Session Laws of North Carolina, 1949) to the area outside of its City limits and within one mile in all directions therefrom, pursuant to authority conferred upon it by Chapter 541, Session Laws of North Carolina, 1949 by Ordinance No. 293 adopted January 23, 1952 and effective February 15, 1952.

2. That the property of the defendants described in the complaint lies within one mile of the City limits of the City of Raleigh and within an area zoned for use as a residential area.

3. That the defendant W. H. Morand admitted that he had devoted his said land to use as a trailer camp or park and that at the time of the hearing he was renting house trailer space to sixteen house trailers at a charge of $16.00 per month for each house trailer.

4. That the use of the defendants' said land for a trailer park or camp and for profit constitutes a violation of a valid and sub-

sisting zoning ordinance of the City of Raleigh and that such use was commenced by defendants after the adoption and effective date of the ordinance prohibiting such use;

IT IS NOW, THEREFORE, ORDERED AND ADJUDGED that the defendants and each of them be and they are restrained and enjoined from continuing the operation of said trailer camp or park on their said property or from the use of said property for any use not permitted by the zoning ordinance of the City of Raleigh.

This 11th day of June, 1957.

F. DONALD PHILLIPS, Judge presiding.

APPENDIX "D"

North Carolina, County of Wake

AFFIDAVIT

C. H. PRITCHARD, being duly sworn, says that he is the City Clerk and Treasurer of the City of Raleigh and has been acting in that capacity since 11/1/55; that he is the custodian of the records, including the ordinances, of the City of Raleigh; that Ordinance No. 542-ZC-14, copy of which is hereto attached, and Ordinance No 293 extending the zoning ordinances of the City of Raleigh a distance of one mile in all directions from the City limits, and Ordinance No. 248, officially adopting zoning map of Raleigh, copies of which ordinances are hereto attached, are all duly adopted ordinances of the City of Raleigh; that they have not been repealed or modified, and were, at the date of the commencement of this action, to-wit: January 9, 1957, and are now valid and subsisting ordinances of the City of Raleigh.

C. H. PRITCHARD.

(Sworn to 4-18-57)

Ordinance No. 542-ZC-14

AN ORDINANCE TO AMEND THE ZONING ORDINANCE OF THE CITY OF RALEIGH. BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF RALEIGH:

Section 1. That the Zoning Ordinance of the City of Raleigh (being Chapter 11 of the City Code and including the Zoning District Map which is a part of said ordinance) is hereby amended as follows:

"Section 4 entitled 'Uses Prohibited in Residential Districts' be changed by the addition of a sub-paragraph 9 to read as follows:

"The parking of one or more house trailers, except that 1. The parking of *one* unoccupied trailer in any accessory private garage building or in a rear yard of an occupied dwelling shall be permitted provided no living quarters shall be maintained or any business practiced in said trailer while

such trailer is so parked or stored, and 2. A trailer shall be permitted as a temporary shelter or office on a construction site during the actual period of construction.

That Section 30 entitled 'Definitions' be changed by the addition of the Subsection Y to read as follows:

HOUSE TRAILERS—any vehicle or structure so designed and constructed in such manner as will permit occupancy thereof as sleeping quarters for one or more persons or the conduct of any business or profession, and so designed that it is, or may be mounted on wheels and used as a conveyance on Highways or city streets drawn by its own or other motive power."

Sec. 2 That this ordinance shall become effective in accordance with law.

Adopted: 11-21-55

Effective: 12-16-55

Distribution:
City Manager
City Attorney
Director of Planning
Building Inspector
City Engineer (2) - For correction of Zoning District Map.

ORDINANCE NO. 293

AN ORDINANCE TO AMEND THE ZONIG ORDINANCE OF THE CITY OF RALEIGH (INCLUDING THE ZONING DISTRICT MAP:)
LE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF RALEIGH:

Section 1. That the Zoning Ordinance (being Chapter 11 of the City Code) of the City of Raleigh (including the Zoning District Map which is a part of said ordinance) is hereby amended as follows:

(a) That Section 33 be repealed and rewritten as follows:

SECTION 33. ZONING MAPS - IDENTIFICATION. The Zoning Maps of the City of Raleigh hereinafter identified are hereby continued and made a part of the Zoning Ordinance of the City of Raleigh, true copies of which, as adopted and now contained, being filed in the office of the City Clerk and Treasurer:

(a) A map entitled "Zoning Map" approved by City Planning Commission - Mayor Graham A. Andrews, Chairman; Philip D. Gattis; William H. Rogers; Paul F. Smith; Calvin Zimmerman; J. E. Sawyer, Secretary; and C. L. Barnhardt, City Engineer, dated January 1, 1945, as amended in accordant with ordinances duly adopted during the period from January 1, 1945, to May 15, 1951, said map, as amended, being further identified by the signatures of P. D. Snipes, Mayor, and H. P. Edwards, City Clerk and Treasurer, under date of 1915.

(b) A map entitled "Zoning Map for Area One Mile Beyond City Limits in All Directions" dated January 15, 1952, consisting of two sheets identified as Sheet 1 and Sheet 2, and being further identified by the signatures of James E. Briggs, Mayor, and H. P. Edwards, City Clerk and Treasurer, under date of January 23, 1952."

"SECTION 33-A ZONING MAPS - CHANGES IN. Whenever, pursuant to ordinances amending this chapter and the maps hereinbefore identified, the City Engineer shall make any changes in the Zoning Maps of the City of Raleigh, he shall set forth on the maps the dates of adoption of the ordinances authorizing the changes together with reference to the ordinance."

(b) That Section 35 be repealed and rewritten as follows:

"SECTION 35. EXTENDING ZONING ORDINANCES OF THE CITY OF RALEIGH A DISTANCE OF ONE MILE IN ALL DIRECTIONS FROM CITY LIMITS. Pursuant to authority contained in Chapter 540, North Carolina Session Laws of 1949, for the purpose of promoting the health, safety, morals and general welfare of citizens of the City of Raleigh and of the territory and community beyond and surrounding the corporate limits of the City of Raleigh for a distance of one mile in all directions, the City Council of the City of Raleigh does hereby extend the

Zoning Ordinances, together with all amendments thereto, of the City of Raleigh to that area beyond and surrounding the corporate limits of the City of Raleigh for a distance of one mile in all directions; and the area beyond and surrounding the corporate limits of the City of Raleigh for a distance of one mile in all directions is divided into classes of districts shown on the Zoning Maps which accompany this ordinance and are hereby declared to be a part of this ordinance.

Sec. 2. That this ordinance shall become effective in accordance with law.

I, H. P. EDWARDS, City Clerk & Treasurer, do hereby certify that the foregoing ordinance was duly adopted by the City Council of the City of Raleigh at a regular meeting on the 23rd day of January 1952, in the manner required by law, that it (or notice of adoption thereof) has been published in full as required by law, and that it becomes effective on February 15, 1952.

This 15th day of February 1952.

H. P. Edwards, City Clerk and Treasurer.

CITY OF RALEIGH
NORTH CAROLINA

Office of
City Clerk-Treasurer

SEC. 4. USES PROHIBITED IN RESIDENTIAL DISTRICTS. In all Residential Districts, except as provided in Sections 10, 22 and 23, hereafter land and buildings shall not be used and no building shall be designed, constructed, altered, enlarged or intended to be used for any one of the following purposes:

1. Any use not listed in Section 3.

2. Any use of prima facie business, commercial or industrial character.

3. Rear-yard dwelling or rear-yard garage apartment.

4. Doctors and dentists offices and clinics except as allowed in Section 3 (a)11.

5. Crematory.

6. Animal hospital or clinic.

7. Correctional or penal institution.

8. Any club or organization operating for profit or engaged in any activity customarily carried on for profit or engaged in any activity customarily carried on for profit. (Ord. 419, 1-20-54)

9. The parking of one or more house trailers except: (a) the parking of one unoccupied trailer in any accessory private garage building or in a rear yard of an occupied dwelling shall be permitted provided no living quarters shall be maintained or any business practiced in said trailer while such trailer is so parked or stored; and (b) A trailer shall be permitted as a temporary shelter or office on a construction site during the actual period of construction. (Ord. 542, 11-21-55)

I, C. H. PRITCHARD, City Clerk and Treasurer of the City of Raleigh, N. C., do certify that the foregoing is a true and exact excerpt from Ordinance 419 adopted at a regular meeting of the City Council of the City of Raleigh on Jan. 20, 1954, and made a part of the City Code, Chap. 11, and amended by Ordinance 542 adopted at a regular meeting of the City Council on Nov. 21, 1955 as shown in sub-section 9.

C. H. PRITCHARD, City Clerk and Treasurer.

ZONING MAP-REVISED EDITION AUTHORIZED-APPROVED

The Public Works and Planning Committee recommended that the revised zoning map of the City of Raleigh be approved and that the City Clerk and Treasurer be authorized to certify the map. On motion of Mr. Green, seconded by Mr. Lewis and unanimously adopted, the Committee recommendation was approved.

I C. H. PRITCHARD, City Clerk and Treasurer of the City of of Raleigh, North Carolina, do hereby certify that the above is a true and exact excerpt from the official minutes of the regular meeting of the City Council of the City of Raleigh on the 7th day of May 1956.

C. H. PRITCHARD, City Clerk and Treasurer.
6/11/57

APPENDIX "E"

TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

Fall Term, 1957

Number 449

CITY OF RALEIGH

versus

W. H. MORAN AND WIFE, MARGARET OLIVENE MORAND

From Wake

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

1. Notice is hereby given that W. H. Morand and wife, Margaret Olibene Morand, appellants above named, hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of North Carolina, filed on the 11th day of December, 1957, and which affirmed the judgment of the Superior Court of Wake County, entered in this action on the 11th day of June, 1957, in which latter mentioned judgment appellants, as defendants, in the Superior Court of North Carolina, were restrained and enjoined from the operation of a trailer camp or park on appellants' property, which is located near but not within the City of Raleigh. Notice is further hereby given that appellants hereby appeal to the Supreme Court of the United States from the final judgment above mentioned of the Supreme Court of the State of North Carolina, which affirmed the judgment of the Superior Court of Wake Cotuny, as above mentioned, for that in the latter mentioned judgment appellants were restrained and enjoined from the aforesaid operation of a trailer camp or park on appellants property, by reason of the alleged repugnance of such operation to alleged valid zoning ordinances of the City of Raleigh, which are allegedly applicable to certain property outside the City of Raleigh but within one mile of the City limits of the City of Raleigh. Notice is also hereby given that appellants

hereby appeal to the Supreme Court of the United States from the final judgment above mentioned of the Supreme Court of the State of North Carolina, which affirmed the judgment of the Superior Court of Wake County, as above mentioned, for that in the latter mentioned judgment, the aforesaid zoning ordinances of the City of Raleigh were held to be valid and constitutional, over appellants' objections and exceptions, as applied to the operations of a trailer camp or park on appellants' property, which is located outside of the City of Raleigh but which property was found by the State Superior Court to be within a mile of the city limits of the City of Raleigh.

This appeal is taken pursuant to 28 U. S. 1257 (2).

11. The Clerk will please prepare a transcript of the record in this cause for transmission to the Clerk of the Supreme Court of the United States, and include in the said transcript the following:

1. The Record in this cause as filed and printed for the use of the Supreme Court of North Carolina during the fall term, 1957, Number 449, and which Record included all of the proceedings which were had before the Superior Court of Wake County, State of North Carolina.

2. The opinion of the Supreme Court of North Carolina, which was filed December 11, 1957.

3. The Mandate or Judgment of the Supreme Court of North Carolina which was entered upon the Opinion of the Supreme Court of North Carolina.

4. The Stay of Execution entered by the Supreme Court of North Carolina on the 16th day of July, 1957.

5. Any Stay of Execution entered by the Supreme Court of North Carolina contemporaneously with the filing of this Notice of Appeal, or as a result hereof, or by reason of the pendency of this appeal.

6. Notice of Appeal to the Supreme Court of the United States, indicating acknowledgment of Service by Counsel of Record for Appellee, the City of Raleigh.

111. The following questions are presented by the appeal:

1. Does the enforcement of the zoning ordinances of the City of Raleigh against appellants' property, as applied in instant case to property which is located outside of the City of Raleigh, deprive appellants of rights, privileges and immunities guaranteed to them by the Due Process Clause of the 14 Amendment to the United States Constitution?

2. Does the enforcement of the zoning ordinances City of Raleigh against appellants' property, as applied in the instant case to property which is located outside of the City of Raleigh, deprive appellants of rights, privileges and immunities guaranto them by the Equal Protection Clause of the 14th Amendment to the United States Constitution?

3. Does the enforcement of the zoning ordinances of the City of Raleigh against appellants property, as applied in the instant case to property which is located outside of the City of Raleigh, deprive appellants of rights, privileges and immunities guaranteed to them by the Privileges and Immunities Clause of the 14 Amendment to the United States Constitution?

4. Is the enforcement of the zoning ordinances of the City of Raleigh against appellants' property, as appiled in the instant case to property which is located outside of the City of Raleigh, an interference with or burden upon interstate commerce in a manner which is directly and unlawfully in conflict with Article 1, Section 8, Clause 3 of the United States Constitution?

5. Does the enforcement of the zoning ordinances of the City of Raleigh against appellants' property, as applied in the instant case to property which is located outside of the City of Raleigh, illegally deprive appellants of the right to engage in a lawful business pursuit and to devote their property to a lawful purpose and undertaking, in a manner in conflict with the 14th Amendment to the United States Constitution?

This 28th day of February, 1958.

/s/EARLE R. PURSER
EARLE R. PURSER
First Citizens Bank Building
Raleigh, North Carolina
Attorney for Appellants

APPENDIX "F"

NORTH CAROLINA GENERAL STATUTE 160-172

"For the purpose of promoting health, safety, morals or the the general welfare of the community, the legislative body of cities and incorporated towns is hereby empowered to regulate and restrict the height, number of stories and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts and other open spaces, the density of population, and the location and use of buildings, structures and land for trade, industry, residence or other purposes. Such regulations may provide that a board of adjustment may determine and vary their application in harmony with their general purpose and intent and in accordance with general or specific rules therein contained."

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JOHN T. FEY, Clerk

SUPREME COURT OF THE UNITED STATES

October Term, 1957

No. 949

W. H. MORAND, AND WIFE, MARGARET OLIBENE MORAND, *Appellants*

vs.

CITY OF RALEIGH, NORTH CAROLINA, *Appellee*

BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

EARLE R. PURSER
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Counsel for Appellants

SUPREME COURT OF THE UNITED STATES

October Term, 1957

No. 949

W. H. MORAND, AND WIFE, MARGARET OLIBENE MORAND, *Appellants*,

vs.

CITY OF RALEIGH, NORTH CAROLINA, *Appellee*.

On Appeal from the Supreme Court of the State of North Carolina

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BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

Appellants herein file this Brief, opposing Appellee's Motion to Dismiss or Affirm, which has been filed in this cause as a response to said Motion to Dismiss or Affirm Appellants' Appeal and pray the Court to consider this opposing Brief along with their STATEMENT AS TO JURISDICTION which is on file in this cause.

I

THE INSTANT APPEAL PRESENTS A PROPERLY RAISED AND PRESENTED FEDERAL QUESTION WHICH WAS DULY PASSED UPON BY THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

Appellee contends in its Motion to Dismiss or Affirm that (1) the Appellants did not "specify what clause, if any, of the United States Constitution was allegedly violated by the zoning ordinance," (2) the trial Judge of the Superior Court of North Carolina "did not mention the federal constitutional question said to be lurking in this case," and (3) the Supreme Court of North Carolina, "in view of the pleadings herein and the arguments before it, affirmed the trial court without once referring to the Constitution of the United States or to any federal constitutional question hidden in the case," (Appellee's Motion to Dismiss or Affirm, page 3). Nevertheless, the sheer circumstance that the federal question was not specially set up does not lead to the conclusion that Appellants may not appeal to this Court, as a matter of right, where it can be demonstrated, beyond peradventure, that "the Federal question appears in the record and was decided or such decision was necessarily involved in the case, and the case could not have been determined without deciding such question," *Columbia W. Power Co. vs. Columbia Electric Street R. L. & P. Co.*, 172 U. S. 475, 19 S.ct. 247, 43 L. ed. 521; *Kaukauna Water Power Co. vs. Green Bay & M. Canal Co.*, 142 U. S. 254, 12 S. ct. 173, 35 L.ed. 1004.

It is observed that the Appellants specially alleged in their answer before the trial court, that appellee's zoning ordinances were "on face discriminatory and in violation of Article I, Section 7 of the Constitution of the State of North Carolina and in violation of the Constitution of the United States and the same is therefore void." State Record pages 8 and 9. It is further observed that the Appellants also specially alleged, in their answer, which was before the trial court, that Appellee's ordinance "is confiscatory in that it attempts to deprive defendants of their property without due process of law in violation of Article I, Section 17, of the Constitution of the State of North Carolina and in violation of the Constitution of the United States." State Record, pages 8 and 9. The State Supreme Court answered Appellants' contention stating that:

"The contention that the provisions of the zoning ordinance prohibiting the use of the defendants' property, which [illegible] for the residential purposes, for use as

trailer camp, constitute arbitrary, unreasonable, and discriminatory restrictions upon the property of the defendants, is untenable. The ordinance applies alike to all property within the territory affected, *Kinney vs. Sutton*, 230 N. C. 404, 53 S.E. 2d 306; *Wake Forest vs. Medlin*, 199 N. C. 83, 154 S.E. 29. . . .

We hold that the ordinance under consideration, which prohibits the construction and maintenance of a trailer camp within areas zoned for residential purposes within the City of Raleigh and within one mile of its corporate limits, is a valid exercise of the police power and may be enforced by injunctive relief, *City of Raleigh vs. Morand et. al.*, 247 N. C. 363, 100 S.E. 2d 870. See the same opinion which is reproduced in Appellants' STATEMENT AS TO JURISDICTION, page 17.

In ruling upon Appellants' contentions, the Supreme Court of North Carolina particularly cited *Kinney vs. Sutton*, 230 N. C. 404, 53 S.E. 2d 306 and *Wake Forest vs. Medlin*, 199 N. C. 83, 154 S.E. 29, where the Supreme Court of North Carolina had discussed the 14th Amendment to the United States' Constitution in specie, and had cited opinions of this Court in support of the after mentioned opinions. Hence, the fact is inescapable that the Supreme Court of North Carolina considered the Equal Protection and Due Process Clauses of the 14th Amendment to the Constitution of the United States in arriving at its conclusion that "the ordinance under consideration, which prohibits the construction and maintenance of a trailer camp within areas zoned for residential purposes within the City of Raleigh and within one mile of its corporate limits, is a valid exercise of the police power. . . . " See Appellants' STATEMENT AS TO JURISDICTION, page 17. It is apparent that the Supreme Court of North Carolina has considered and determined that Appellants' use of the word "discriminatory" in conjunction with an alleged violation of the Constitution of the United States, is an impleading of the Equal Protection Clause of the 14th Amendment to the Federal Constitution, and that the Appellants' use of the phrase, "confiscatory in that it attempts to deprive defendants of their property without due process of law," in conjunction with an al-

leged violation of the Constitution of the United States, is an impleading of the Due Process Clause of the 14th Amendment to the federal constitution. This conclusion is fortified by the circumstance that the Supreme Court of North Carolina made no reference in specie to Sections 7 and 17 of Article I of the state Constitution, although these two constitutional provisions were specially set up in Appellants' Answer which was before the trial court, (State Record, pages 8 and 9).

Moreover, it is observed that the Supreme Court of North Carolina has consistently maintained that the concept of "law of the land," as used in Section 17 of Article I of the Constitution of North Carolina, is interchangeable with the concept of "due process of law," as found in the federal Constitution, *State vs. Ballance*, 229 N. C. 764, 51 S.E. 2d 731, 7 A.L.R. 2d 407. See also *Eason et al vs. Spence et al.*, 232 N. C. 579, 61 S.E. 2d 217; *Sale vs. State Highway and Publci Works Commission*, 242 N. C. 612, 89 S.E. 2d 290. Thus it necessarily appears that appellants' express use of the phrase "due process of law," in conjunction with an alleged violation of the Constitution of the United States, after having expressly referred to Section 17 of Article I of the state Constitution, was an unequivocal invocation of the Due Process Clause of the 14th Amendment of the federal Constitution. And it is equally as obvious that, because of the interchangeability of the phrases "law of the land" and "due process of law," the 14th Amendment to the federal Constitution was necessarily involved in the conclusion and decision of the state Supreme Court.

Finally, none of the cases cited by Appellee in its Motion to Dismiss or Affirm, (Appellee's Motoion to Dismiss or Affirm, page 4), has any bearing upon the instant inquiry, in as much as all of the cases which are ostensibly in point are cases wherein the state Supreme Courts have *expressly declined to review the federal constitutional question allegedly involved* because of the party's failure to properly present the case to the state tribunal.

Compare *Herndon vs. Georgia, Illinois,* 196 U. S. 78, 25 S. Ct. 176, 49 L. ed. 394; *Bowe vs. Scott,* 233 U. S. 658, S. Ct., 58 L. ed. 1141. However, where the state tribunal has actually passed upon the constitutional question, this Court grants review inspite of the inarticulate manner in which the constitutional question was presented to the state court whose decision is before this Court for review, *Miedreich vs. Lauenstein,* 232 U. S. 236, 34 S. Ct. 309, 58 L. ed. 584.

II

THE INSTANT APPEAL PRESENTS A SUBSTANTIAL FEDERAL QUESTION WHICH SHOULD BE PASSED UPON BY THIS COURT.

Appellants stressfully contend that the questions presented in their STATEMENT AS TO JURISDICTION are substantial and merit the consideration of this Court. The ordinances under protest on this appeal unreasonably subject Appellants' land to a jurisdiction which is entirely foreign to it and unreasonably subject Appellants' land to the whims and caprices of an authority which can not bestow reciprocal benefits upon Appellants, 37 Am. Jur. (Municipal Corp.) Section 284. The ordinances, considering their extra-territorial effect upon Appellants, are necessarily totally oblivious to the ordinary, proper and profitable use to which Appellants' rural property can be put. Compare *Nectow vs. City of Cambride,* 277 U. S. 183, 48 S. Ct. 447, 72 L. ed. 842. It is not enough to assume, as Appellee apparently does, that a zoning jurisdiction invested in the people of the City of Raleigh, to be exercised "for the purpose of promoting the health, safety morals or the general welfare" of the City of Raleigh, (North Carolina General Statute 160-172, can be exercised *against* land outside of the City of Raleigh simply because the extra-territorial exercise of the zoning jurisdiction will benefit the people within the corporate limits. Compare *Myles Salt Company vs. Board of Commissioners of Iberia and St. Mary Draining District,* 239 U. S. 479, 36 S. Ct. 204, 60 L. ed. 392.

CONCLUSION

It is respectfully submitted that the instant appeal presents a properly raised and substantial federal question under 28 U. S. C. 1257(2) and that it was passed upon by the court below.

Respectfully submitted

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JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 949

W. H. MORAND AND WIFE, MARGARET OLIBENE MORAND,
Appellants

v.

CITY OF RALEIGH, NORTH CAROLINA, *Appellee*

On Appeal from the Supreme Court of the State of North Carolina

MOTION TO DISMISS OR AFFIRM

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No.

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On Appeal from the Supreme Court of the State of North Carolina

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MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16, paragraph 1 (b) of the Revised Rules of this Court, appellee, City of Raleigh, North Carolina moves that the appeal from the Supreme Court of the State of North Carolina be dismissed, or that the judgment of said Court be affirmed.

STATEMENT OF ISSUES ON APPEAL

This is an appeal from a judgment entered December 11, 1957 by the Supreme Court of the State of North Carolina upholding an injunction restraining the appellants from continued violation of the zoning ordinances of the City of Raleigh, North Carolina. The injunction re-

strained the defendants from operating a trailer camp or park on their property in an area zoned solely for residential use. This injunction was issued June 11, 1957 by the Superior Court of Wake County, North Carolina, following a hearing and was based upon findings of fact that the City of Raleigh, pursuant to North Carolina law, had extended its zoning jurisdiction one mile beyond its corporate limits, that the property of the appellants lay within this one-mile zone, that the appellants were operating a trailer camp or park on their property in violation of an existing zoning ordinance of the City of Raleigh, and that such use was commenced by the appellants after the adoption and effective date of the ordinance prohibiting such use.

The appellants thereafter appealed as of right to the Supreme Court of the State of North Carolina. That Court affirmed the judgment of the Superior Court without mention of any constitutional questions, state or federal, in its opinion. 247 N. C. 363, 700 S. E. 2d 870. The Court further noted that, since the appellants had not excepted to any findings of fact, the findings were binding on the appeal. The questions before the North Carolina Supreme Court were (1) Do the facts found support the conclusions of law and the judgment entered thereon, and (2) Does any error appear upon the face of the record? (Statement as to Jurisdiction, page 14).

ARGUMENT

I. The Attempted Appeal Should be Dismissed for Failure to Present Properly a Federal Question

The appellants in their Statement as to Jurisdiction contend that the North Carolina Supreme Court necessarily ... ed upon the federal constitutional question said to be found in this case. The record, the briefs and the opinion of the North Carolina Supreme Court all refute this statement.

The appellants in their answer filed in the Superior Court of Wake County, the court of original jurisdiction, failed to specify what clause, if any, of the United States Constitution was allegedly violated by the zoning ordinance. Their answer contained two separate paragraphs alleging that the zoning ordinance was (1) discriminatory "and in violation of the Constitution of the United States" and (2) deprived them of their property without due process of law "in violation of the Constitution of the United States." (State Record, pages 8 and 9).

These two catch-all references to the United States Constitution are the only ones to be found in the pleadings.

The Judge of the Superior Court in his opinion granting the requested injunction *did not* mention the federal constitutional question said to be lurking in this case. (State Record, pages 10 and 11).

In their appeal to the North Carolina Supreme Court, the appellants filed a thirteen-page brief in support of their arguments against the enforcement of the ordinance in question. They set out in detail their contentions based upon the Constitution of the State of North Carolina. But no cases were cited and no argument was made based upon the Constitution of the United States. Finally in the last paragraph of their argument, appellants contended that the ordinance in question deprived the defendants "of the equal protection of the laws guaranteed by the 14th Amendment of the Constitution of the United States."

The Supreme Court of the State of North Carolina, in view of the pleadings herein and the arguments before it, affirmed the trial court without once referring to the Constitution of the United States, or to any federal constitutional question hidden in the case. (Appellants' Statement as to Jurisdiction, pages 13-15).

In this case, as in many others, a broadside attack upon a state act (or city ordinance) has been made upon the ground that it is in violation of the United States Constitution. This Court in the exercise of its appellate jurisdiction from the highest courts of the various states has consistently dismissed such appeals as lacking a federal question. *Herndon* v. *Georgia*, 295 U. S. 441, 442 (1935). A mere reference to the "Constitution of the United States" or to "due process of law" lays no basis for an appeal to this Court. *Herndon* v. *Georgia*, 295 U.S. 441, 442-3; *Harding* v. *Illinois*, 196 U. S. 78, 88; *Capital City Dairy Co.* v. *Ohio*, 183 U. S. 238, 248; *Oxley Stove Co.* v. *Butler County*, 166 U.S. 648; *Bowe* v. *Scott*, 233 U.S. 658, 664-5.

In this case there is nothing more than a mere allegation that the enforcement of a municipal ordinance violated the defendants' rights under the federal constitution. If such an allegation, without a State Court ruling on the alleged constitutional question, is sufficient to invoke this Court's appellate jurisdiction under 28 U. S. C. 1257 (2), then any and all state court cases can be made appealable to this Court by simply adding a standard clause to every pleading.

Furthermore, where a State Supreme Court has not passed upon a federal question, and the record does not disclose what federal question, if any, was before the state court, this Court on appeal has refused to consider the federal question. *Northwestern Bell Telephone Co.* v. *Nebraska State Railway Commission*, 297 U. S. 471 (1936); compare *McGoldrich* v. *Compagnie Generale*, 309 U. S. 414, 434 (1940).

II. It Is Manifest That the Question on Which the Decision of the Case Depends Is So Unsubstantial As Not to Need Further Argument

The Federal question which the appellants are seeking to have this Court review is unsubstantial. This Court's decision in *Euclid* v. *Ambler Realty Company*, 272 U. S. 365

(1926) settled the question that municipal zoning ordinances regulating land use are within the state's police power and do not violate the Fourteenth Amendment.

This decision has been consistently followed in this Court. *Zahn* v. *Board of Public Works*, 274 U. S. 325 (1927); *Gorieb* v. *Fox et al.*, 274 U. S. 603 (1927), and in state courts and lower federal courts. 58 American Jurisprudence 947, 948; 54 ALR 1016; 86 ALR 659; 117 ALR 1117 and cases cited.

Appellants contend that this case presents a novel question because the zoning authority is exercised by a municipal board beyond the territorial limits of the municipality. The North Carolina Supreme Court expressly upheld the ordinance in question against this attack. (Statement as to Jurisdiction, page 16). This question relates solely to North Carolina law, and presents no federal constitutional issue.

Appellants further contend that this case does not relate to the extra-territorial effect of municipal jurisdiction for sanitary or police purposes, but solely to regulation of land use for esthetic considerations. (Statement as to Jurisdiction, page 10).

The short answer to this contention is that the record contains no such findings of fact, and the appellants have not excepted to the findings of fact made by the trial judge. On the contrary, the Court below could well have taken judicial notice that trailer camps can indeed create problems of sanitation and fire protection, and that a municipality of necessity must regulate such hazards on its borders.

The appellants have failed to show that the City of Raleigh zoning ordinance in question constitutes such an unreasonable or discriminatory abuse of the state's police power as to deprive them of their property without due process of law and in violation of the Fourteenth Amend-

ment to the Constitution of the United States. *Euclid* v. *Ambler Realty Company*, 272 U. S. 365; *Zahn* v. *Board of Public Works*, 274 U. S. 325.

The appellee submits that the questions presented in this appeal has long ago been so definitely determined that no substantial question is presented by this appeal entitling appellants to invoke the jurisdiction of the Supreme Court of the United States.

Wherefore, appellee respectfully moves that the within appeal be dismissed, or that the judgment and decree of the Supreme Court of the State of North Carolina be affirmed.

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